

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

OCT 13 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Implementation of Section 309(j) of)	MM Docket No. 97-234
the Communications Act -- Competitive)	
Bidding for Commercial Broadcast)	
and Instructional Television Fixed)	
Service Licenses)	
)	
Reexamination of the Policy Statement)	
on Comparative Broadcast Hearings)	GC Docket No. 92-52
)	
Proposals to Reform the Commission's)	
Comparative Hearing Process to)	GEN Docket No. 90-264
Expedite the Resolution of Cases)	

To: The Commission

CONTINGENT PETITION FOR RECONSIDERATION

HOMEWOOD RADIO CO., L.L.C. ("HRC"),^{1/} pursuant to Section 405(a) of the Communications Act of 1934, as amended (the "Act"),^{2/} and Section 1.429(a) of the Commission's Rules,^{3/} hereby submits this contingent request for reconsideration in part of the Commission's *First Report and Order* in Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses(MM Docket No. 97-234), 13 FCC Rcd ____ (FCC

^{1/} By *Memorandum Opinion and Order*, the Commission granted the Joint Request for Approval of Settlement that provided for the merger of Homewood Partners, Inc. ("Partners") and WEDA, Ltd. ("WEDA") into HRC and granted the application of WEDA, as amended, in the name of HRC. Heidi Damsky, 13 FCC Rcd 11688 (1998) (hereinafter "*Memorandum Opinion and Order*").

^{2/} 47 U.S.C. § 405(a).

^{3/} 47 C.F.R. § 1.429(a).

98-194, released August 18, 1998).^{4/}

A. HRC Is A Party In Interest

1. HRC is construction permittee of a new FM station at Homewood, Alabama. As noted in footnote 1, supra, the Commission awarded the construction permit to HRC Commission following approval of merger between two formerly mutually exclusive applicants for the Homewood FM station and denied the application of Heidi Damsky, who was found to be financially unqualified. Heidi Damsky, 13 FCC Rcd 11688 (1998), recon. denied, 13 FCC Rcd ____ (FCC 98-202, released August 25, 1998 (the "*Reconsideration Order*"). In approving the settlement and merger that created HRC, the Commission noted that:

... given our disqualification of Damsky, the settlement agreement is a full-market settlement agreement between all qualified parties. Thus, the settlement here would avoid mutual exclusivity and the potential need for competitive bidding to award the license, thereby falling squarely within the underlying purpose of the waiver provision [of the Balanced Budget Act of 1997].

(*Memorandum Opinion and Order*, at ¶ 8). In other words, the Commission specifically took account of the possible use of auctions in the Homewood, Alabama case and nevertheless chose to exempt the case from auction.

2. Presently before the Commission in the Homewood case, MM Docket No. 90-638, is a pleading styled a "Further Petition for Reconsideration," filed September

^{4/} HRC's Petition is timely filed. 47 C.F.R. § 1.429(d) (petitions for reconsideration due no later than 30 days from the "public notice" of the action in question). The summary of the *First Report and Order* was published in the Federal Register on September 11, 1998. 63 Fed. Reg. 48615 (Sep. 11, 1998). Where rulemaking documents are published in the Federal Register, "public notice" commences on the date of publication in the Federal Register. 47 C.F.R. § 1.4(b)(3).

21, 1998 by Damsky. In the Further Petition, citing *First Report and Order* at ¶ 89, she contends that the Commission's adoption of auction rules for selection among broadcast station applicants compels setting aside the *Memorandum Opinion and Order* and allowing her to bid for the Station's authorization. In its Opposition, HRC demonstrated that this was not so, given that the Commission had fully resolved against Damsky the questions about her financial qualifications and denied both her exceptions and request for reconsideration of her disqualification. Further, HRC pointed out that the Commission had specifically terminated the case and had held in the *Memorandum Opinion and Order* that the settlement approved therein avoided mutual exclusivity and the need for any auction.

3. It is clear to HRC in light of the portion of the *Memorandum Opinion and Order* at ¶ 8 cited above that the Commission has already disposed of this issue in the Homewood case. The Commission has fully adjudicated the qualifications of Damsky and disqualified her. The Commission's disqualification of Damsky is not yet final only because of her repeated, meritless requests for reconsideration and stay.^{5/}

4. HRC would be injured by an interpretation of the *First Report and Order* consistent with Damsky's overreaching view of Paragraph 89, which would overturn by rulemaking the Commission's prior conclusion in an adjudication that this case would

^{5/} The Commission has already denied Damsky's exceptions to the Initial Decision and the ultimate conclusion that she was not financially qualified. See, Memorandum Opinion and Order. The Commission has already denied her requests for reconsideration and stay of the grant of the HRC application, which she premised in part on an appeal of her disqualification. Reconsideration Order. Thus, the Commission has already fully considered all Damsky's requests for relief regarding her own qualifications and denied reconsideration thereof. The issue of her lack of financial qualifications is not unresolved.

not be subject to auction. Accordingly, HRC is a party in interest qualified to seek reconsideration.

5. HRC understands that various parties have sought reconsideration of the *First Report and Order*. In the unlikely event that the Commission does not dispose of this matter in the Homewood case, the Commission should on reconsideration of the *First Report and Order* clarify Paragraph 89 to make plain that it does not apply to situations like Damsky's where there has been a full hearing questions about her qualifications, including denial of exceptions and reconsideration.

**B. Damsky's Contentions Fly In Face
of Congressional Intent**

6. HRC does not generally take issue with the First Report and Order, including its decision to employ competitive bidding even in those hearing cases that did not produce a universal settlement. 47 U.S.C. § 309(l). The Homewood case is not one of those cases because the Commission concluded that there had been a universal settlement. See Memorandum Opinion and Order, at ¶ 8

7. If the Commission does not dispose of Damsky's interpretation in the Homewood case, the Commission should clarify the distinction between cases, such as the instant one, where the Commission has resolved basic qualifications issues and those where there remain *unresolved* questions about an applicant's qualifications. In this case, the Commission has already held a full evidentiary hearing on Damsky's qualifications, denied her exceptions and denied reconsideration of the denial of her exceptions. This is not a situation involving unresolved questions regarding an

applicant's qualifications.

8. Acceptance of a contrary interpretation of the *First Report and Order* would fly in the face of the Congressional directive that Congress' grant of auction authority not:

be construed to relieve the Commission of the obligation in the public interest to continue to use ... threshold qualifications ... in order to avoid mutual exclusivity in application and licensing proceedings.

47 U.S.C. § 309(j)(6)(E). In adopting the Balanced Budget Act of 1997, which extended the Commission's authority to use competitive bidding to broadcast applications, the Conference Committee specifically cautioned the Commission that it not overlook this obligation. As the first matter in its Conference Agreement regarding the new auction authority, Congress emphasized that it did not intend that auctions be blindly used in all cases:

[T]he conferees emphasize that notwithstanding its expanded auction authority, the Commission must still ensure that its determinations regarding mutual exclusivity are consistent with the Commission's obligations under Section 309(j)(6)(E). The Conferees are particularly concerned that the Commission might interpret its expanded competitive bidding authority in a manner that minimizes its obligations under Section 309(j)(6)(E), thus overlooking engineering solutions, negotiations, or *other tools that avoid mutual exclusivity*.

H.R. Conf. Report 217, 105th Congress 1st Sess. 572. The Commission specifically recognized that Congress has emphasized the importance of not creating auction situations where not necessary. *First Report and Order*, at ¶ 74. The Commission should not ignore Congress' directive that it not create mutual exclusivity where it does not or should not exist.

C. Conclusion

9. The arguments advanced by Damsky seek to create mutual exclusivity where it no longer exists. The disqualification of Damsky and approval of the HRC settlement are consistent with Congress' directive in Section 309 (j)(6)(E). Accordingly, in the event that the Commission does not do so in the context of the Homewood case and its action upon Damsky's Further Petition for Reconsideration, the Commission should modify the *First Report and Order* to clarify that auctions do not apply to situations such as the Homewood case, where the Commission has fully adjudicated the disqualification of an applicant and there has otherwise been a full market settlement.

Respectfully submitted,

HOMEWOOD RADIO CO., L.L.C.

By: 

Stephen Diaz Gavin

PATTON BOGGS LLP

2550 M Street, N.W.

Washington, D.C. 20037

(202) 457-6000

Its Counsel

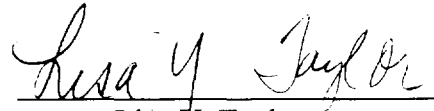
Dated: October 13, 1998

b:\reconro1 pld\8283.100

CERTIFICATE OF SERVICE

I, Lisa Y. Taylor, a secretary in the law firm of Patton Boggs LLP, do hereby certify that a copy of the foregoing "**CONTINGENT PETITION FOR RECONSIDERATION**" has been sent via U.S. Mail, First-Class postage prepaid, this 13th day of October, 1998 to the following individual:

Lauren A. Colby, Esquire
10 East Fourth Street
P.O. Box 113
Frederick, MD 21701
Counsel for Heidi Damsky



Lisa Y. Taylor